

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs November 27, 2007

ANTHONY BOWEN v. HOWARD CARLTON, WARDEN

**Direct Appeal from the Criminal Court for Johnson County
No. 5085 Lynn W. Brown, Judge**

No. E2007-01845-CCA-R3-HC - Filed February 20, 2008

The petitioner, Anthony Bowen, appeals from the trial court's dismissal of his habeas corpus petition. He alleges that the trial court erred in not finding him indigent, dismissing his petition without an evidentiary hearing or appointment of counsel, and failing to make proper findings of fact and conclusions of law in its order of dismissal. The State argues that summary dismissal of the petition was proper. Following our review, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

ALAN E. GLENN, J., delivered the opinion of the court, in which NORMA MCGEE OGLE and D. KELLY THOMAS, JR., JJ., joined.

Anthony Bowen, Mountain City, Tennessee, Pro Se.

Robert E. Cooper, Jr., Attorney General and Reporter, and Sophia S. Lee, Assistant Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS/PROCEDURAL HISTORY

In 1986 the petitioner was convicted of four counts of aggravated kidnapping and two counts each of aggravated rape and aggravated assault. He received an effective sentence of 170 years, modified to 145 years by this court on direct review. See State v. Anthony Bowen, No. 1107, 1987 WL 13690, at *4 (Tenn. Crim. App. July 13, 1987), perm. to appeal denied (Tenn. Oct. 5, 1987). Following his direct appeal, the petitioner sought post-conviction relief on the basis that his trial counsel was ineffective; the trial court denied relief, and this court affirmed. Anthony Bowen v. State, No. 03C01-9111-CR-00353, 1992 WL 70929 (Tenn. Crim. App. Apr. 10, 1992), perm. to appeal denied (Tenn. July 27, 1992). In 2003 the petitioner first sought habeas corpus relief, alleging that the trial court was without jurisdiction to sentence him for aggravated kidnapping because such

convictions violated his right to due process of law and that his judgments were facially void because they were unsigned by the trial judge. The trial court summarily dismissed his petition, and, although the record reflects that the petitioner filed a notice of appeal, it does not appear that he pursued appellate review of the trial court's decision.

The petitioner's current habeas corpus petition alleged that he was being illegally restrained of his liberty because (1) his indictments violate the rule against multiplicity, and (2) the Tennessee Sentencing Reform Act of 1982, under which he was sentenced, is unconstitutional in light of Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004), and Cunningham v. California, ___ U.S. ___, 127 S. Ct. 856 (2007). The State filed a motion to dismiss the petition on the grounds that the petitioner failed to state a cognizable claim for habeas corpus relief. The trial court, finding that "[n]othing in the petition would support a finding by this court that petitioner[']s conviction is void or that his sentence has expired[,]," summarily dismissed the petition. The court found that the petitioner's pauper's oath and affirmation were insufficient to make a finding of indigency and taxed the court costs to the petitioner.

ANALYSIS

The petitioner contends that the trial court erred in not finding him indigent and not holding a hearing on his motion to proceed *in forma pauperis*. He also argues that the trial court erred in summarily dismissing his petition and not issuing "proper findings of fact and conclusions of law" in its order of dismissal. The State argues that summary dismissal was proper because the petitioner failed to raise a meritorious claim for habeas corpus relief.

It is well-established in Tennessee that the remedy provided by a writ of habeas corpus is limited in scope and may only be invoked where the judgment is void or the petitioner's term of imprisonment has expired. State v. Ritchie, 20 S.W.3d 624, 630 (Tenn. 2000); State v. Davenport, 980 S.W.2d 407, 409 (Tenn. Crim. App. 1998). "A judgment is void only when it appears upon the face of the judgment or the record of the proceedings upon which the judgment is rendered that a convicting court was without jurisdiction or authority to sentence a defendant, or that a defendant's sentence of imprisonment or other restraint has expired." Hoover v. State, 215 S.W.3d 776, 778 (Tenn. 2007) (citation omitted). The judgment of a court of general jurisdiction is conclusive and presumed to be valid, and such a judgment can only be impeached if the record affirmatively shows that the rendering court was without personal or subject matter jurisdiction. Archer v. State, 851 S.W.2d 157, 162 (Tenn. 1993). The determination of whether habeas corpus relief should be granted is a question of law subject to *de novo* review by this court. Summers v. State, 212 S.W.3d 251, 255 (Tenn. 2007).

To obtain habeas corpus relief, the petitioner must show by a preponderance of the evidence that his sentence is void and not merely voidable. See Davenport, 980 S.W.2d at 409. Consequently, a petitioner cannot collaterally attack a facially valid judgment of the trial court in a petition for habeas corpus relief. Archer, 851 S.W.2d at 162. The proper means of challenging a facially valid judgment based on a constitutional violation is a petition for post-conviction relief.

Lewis v. Metro. Gen. Sessions Court for Nashville, 949 S.W.2d 696, 699 (Tenn. Crim. App. 1996); Fredrick v. State, 906 S.W.2d 927, 929 (Tenn. Crim. App. 1993). If the habeas corpus petition fails to state a cognizable claim for relief, the trial court may summarily dismiss it without appointing counsel or holding an evidentiary hearing. State ex rel. Byrd v. Bomar, 381 S.W.2d 280, 283 (Tenn. 1964).

I. Indigency

The petitioner argues that the trial court erred in failing to properly determine his indigency. He contends that the trial court should have held a hearing on his motion to proceed *in forma pauperis* and requests that we review the record and declare him indigent. The State interprets this argument as an assertion that the trial court should have appointed counsel for the petitioner prior to dismissing the petition and argues that the trial court acted properly within its discretion in dismissing the petition without appointing counsel. As we will explain, we agree with the State.

As for the petitioner's claim that the trial court should have found him to be indigent, we note that even if this were a proper matter to be raised on appeal, the record is insufficient for us to consider it. In his appellate brief, the petitioner states that he provided to the trial court a statement displaying the previous six months' activity in his inmate trust fund account, a motion to proceed *in forma pauperis*, and a pauper's oath and affirmation. However, these documents are not in the record on appeal, and it is the duty of the appellant to provide a complete and accurate record on appeal. Tenn. R. App. P. 24(b). The record does include a "Uniform Affidavit of Indigency," filed on July 23, 2007, ten days after the trial court's order of dismissal and the same day as the petitioner's notice of appeal. Because jurisdiction of the Court of Criminal Appeals attaches with the filing of the notice of appeal, State v. Givhan, 616 S.W.2d 612, 613 (Tenn. Crim. App. 1980), this document is not properly in the record.

II. Summary Dismissal

Because the petitioner's second and third arguments are closely related, we will address both simultaneously. He argues that the trial court erred in summarily dismissing his petition without holding a hearing, appointing counsel, or including findings of fact and conclusions of law in its order of dismissal. The State responds that summary dismissal was proper because the petition did not state a cognizable claim for habeas corpus relief, and the trial court was therefore correct to dismiss it summarily. As we will explain, we again agree with the State.

As set out previously, summary dismissal is proper only where the petition fails to state a cognizable claim for habeas corpus relief. Therefore, we must analyze whether any of the petitioner's claims are subject to habeas corpus review. The petition alleged that the convictions and sentences are void because (1) the indictments, convictions, and sentences are multiplicitous; and (2) the sentencing statute under which the petitioner was sentenced is unconstitutional in light of Cunningham. We will examine each claim in further detail.

The petitioner first argued that his indictments were multiplicitous because they charged two counts of aggravated rape which were committed at the same time as part of a single continuing criminal act, inspired by the same criminal intent. Any determination of the merits of such a claim would require us to look beyond the face of the judgments; therefore, it is not a cognizable claim for habeas corpus relief. See Gary Lynn Vernon v. Jim Dickman, Warden, No. M2003-02268-CCA-R3-HC, 2004 WL 1778480, at *2 (Tenn. Crim. App. Aug. 9, 2004) (where the habeas corpus petitioner alleged that the indictment was invalid for multiplicity, summary dismissal was appropriate because a valid claim would render the convictions voidable, not void), perm. to appeal denied (Tenn. Oct. 11, 2004). The petitioner also argued that his two convictions for aggravated assault were multiplicitous with two of his aggravated kidnapping convictions, because each pair of assault and kidnapping convictions stemmed from the same criminal conduct occurring at the same time against a single victim. For the same reason, this claim is also non-cognizable in a habeas corpus proceeding.

As we understand his pleadings, the petitioner also alleged that his sentences were illegal because they were based in part on mandatory judicial fact-finding, in contravention of Blakely and Cunningham. Blakely holds that any fact other than that of a prior conviction used to enhance a defendant's sentence beyond the presumptive statutory maximum must be found by a jury beyond a reasonable doubt. 542 U.S. at 301. Cunningham holds that a determinate sentencing law, similar to Tennessee's pre-2005 sentencing law, which permits judges to impose sentences above the statutory maximum based on judicially-found facts violates criminal defendants' Sixth Amendment right to a jury trial. ___ U.S. at ___, 127 S. Ct. at 860. However, Blakely and Cunningham are inapplicable to the petitioner's case, which became final on direct appeal in 1987. This court has held that "Apprendi/Blakely type issues regarding allocating fact-finding authority to judges during sentencing are not in the narrow class of procedural rules that apply retroactively." Ulysses Richardson v. State, No. W2006-01856-CCA-R3-PC, 2007 WL 1515162, at *2 (Tenn. Crim. App. May 24, 2007), perm. to appeal denied (Tenn. Sept. 17, 2007). Furthermore, even a valid Blakely claim renders a conviction voidable, not void, and is thus non-cognizable in habeas corpus review. Richardson, 2007 WL 1515162, at *3.

Because the petitioner did not state a cognizable claim for habeas corpus relief in his petition, summary dismissal by the trial court was appropriate. Tenn. Code Ann. § 29-21-109; Byrd, 381 S.W.2d at 283. All of his claims are without merit.

CONCLUSION

Based upon the foregoing authorities and reasoning, the judgment of the Johnson County Criminal Court is affirmed.

ALAN E. GLENN, JUDGE